Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(NCVC)(W)-264–07 OF 2013, W-01(NCVC)(W)-280–08 OF 2013, W-01(NCVC)(W)-291–08 OF 2013 AND W-02(NCVC)(W)-1773–08 OF 2013
ZAHARAH IBRAHIM, ABDUL AZIZ AB RAHIM AND ZAWAWI SALLEH JJCA
28 JANUARY 2015

Tort — Assault — Assault by servant in course of employment — Assault by police officers against plaintiff during interrogation in detective room — Arrested person sustained bodily and psychological injuries — Police officers convicted for voluntarily causing hurt to arrested person to extort confession — Whether OCPD committed tort of misfeasance in public office — Whether Government of Malaysia vicariously liable as employers — Whether exemplary damages can be awarded when police officers had been convicted and sentenced by criminal court — Penal Code ss 34 & 330

There were four appeals from the High Court in this case. The parties were referred as they were in the High Court. The plaintiff was arrested by a police team and was taken the detective room at the police station. It was alleged by the plaintiff that he was assaulted by the first to seventh defendants. The plaintiff was punched, kicked and splashed with hot water. In the sessions court, the first to seventh defendants were charged for the offence of voluntarily causing hurt to the plaintiff to extort a confession, under s 330 of the Penal Code. The first and second defendants were convicted for the offence and sentenced to four years of imprisonment while the third to seventh defendants were acquitted. The plaintiff submitted that the first to seventh defendants had assaulted the plaintiff and the eighth defendant, the OCPD in charge, had committed a tort of misfeasance in public office and as such, the ninth defendant being the employer of the second to seventh defendants, was vicariously liable for the acts of the defendants. The issues that arose in this case were whether the second, fourth, fifth and seventh defendants unlawfully assaulted the plaintiff; whether the eighth respondent had committed a tort of misfeasance in public office; whether the ninth respondent was vicariously liable for the acts of the first to eighth defendants; and whether exemplary damages can, in law, be awarded to the plaintiff when the first and second defendants had been convicted and sentenced by a criminal court on a charge in respect of the corresponding acts.

Held, allowing the appeal in part:

(1) There was sufficient evidence that the second defendant had assaulted the plaintiff. The entries in the station diary clearly showed that it was the second defendant who conducted the interrogation. The evidence of the plaintiff was corroborated by SP4 who testified that he saw the first and second defendants torturing the plaintiff by splashing hot water on him, acting aggressively towards him and shouting and yelling at him. However, there was no direct evidence connecting the third and fifth defendants to the alleged assault. The fourth and seventh defendants had the opportunity to assault the plaintiff. The fourth defendant was in the detective room and there was no evidence that he had left the room. The fourth defendant had kicked and assaulted the plaintiff and the seventh defendant was positively identified by the plaintiff as one of the persons who had assaulted him (see paras 19–21, 27, 34–36).

(2) There was no sufficient evidence to establish the deliberate dishonest abuse of powers on the part of the eighth defendant or that he had actual appreciation that the plaintiff would suffer loss or was recklessly indifferent as to whether the plaintiff would suffer loss (see para 43).

(3) If a close connection between the deviated actions of an employee and the purpose or nature of his employment is established by certain factual evidence, an employee may be found to be acting within the scope of his employment. In this case, the impugned acts of the defendants were closely connected with the acts that they were authorised to do interrogation. They had wanted an admission out of the plaintiff and in order to extricate this admission, they had assaulted him (see paras 68 & 70).

(4) The plaintiff was entitled to pursue a claim for exemplary damages even though the defendants have received a sentence of imprisonment following their convictions for the assaults on which the actions were based. The judge's decision about the types of damages which could appropriately be awarded in the appeals was right. The judge took into account the proper consideration of all the factors which he had to decide (see para 89).

[Bahasa Malaysia summary

Terdapat empat rayuan daripada Mahkamah Tinggi dalam kes ini. Pihak-pihak dirujuk sebagaimana mereka di Mahkamah Tinggi. Plaintif telah ditangkap oleh sepasukan polis dan dibawa ke bilik detektif di balai polis. Adalah didakwa oleh plaintif bahawa dia telah diserang oleh defendan pertama hingga ketujuh. Plaintif telah ditumbuk, ditendang dan disimbah dengan air panas. Di mahkamah sesyen, defendan pertama hingga ketujuh didakwa untuk kesalahan dengan sengaja menyebabkan kecederaan terhadap plaintif untuk mendapatkan pengakuan, di bawah s 330 Kanun Keseksaan. Defendan pertama dan kedua telah disabitkan bersalah untuk kesalahan dan dihukum

empat tahun penjara manakala defendan ketiga hingga ketujuh dibebaskan. Plaintif mengemukakan bahawa defendan pertama hingga ketujuh telah menyerang plaintif dan defendan kelapan, OCPD bertanggungjawab, telah melakukan tort misfeasans di jabatan awam dan oleh itu, defendan kesembilan yang merupakan majikan kepada defendan pertama hingga ketujuh, adalah bertanggungan secara vikarius untuk tindakan defendan-defendan. Isu yang timbul dalam kes ini adalah sama ada defendan kedua, keempat, kelima dan ketujuh secara salah menyerang plaintif; sama ada defendan kelapan telah melakukan tort misfeasans di jabatan awam; sama ada responden kesembilan adalah bertanggungan secara vikarius atas tindakan defendan pertama hingga kelapan; dan sama ada ganti rugi tauladan boleh, dalam undang-undang, diawardkan kepada plaintif apabila defendan pertama dan kedua telah disabit dan dihukum oleh satu mahkamah jenayah atas dakwaan berkaitan dengan tindakan yang sama.

Diputuskan, membenarkan sebahagian rayuan:

(1) Terdapat keterangan yang mencukupi bahawa defendan kedua telah menyerang plaintif. Catatan di dalam diari balai jelas menunjukkan bahawa ia adalah defendan kedua yang telah menjalankan soal siasat. Keterangan plaintif disokong oleh SP4 yang memberi kesaksian bahawa dia melihat defendan pertama dan kedua mendera plaintif dengan menyimbah air panas kepadanya, bertidak secara agresif terhadapnya dan menjerit serta memekik kepadanya. Walau bagaimanapun, tiada keterangan langsung yang mengaitkan defendan ketiga dan kelima kepada serangan yang dikatakan tersebut. Defendan keempat dan ketujuh mempunyai peluang untuk menyerang plaintif. Defendan keempat berada di dalam bilik detektif dan tiada keterangan bahawa dia telah meninggalkan bilik tersebut. Defendan keempat telah menendang dan menyerang plaintif dan defendan ketujuh telah positif dikenal pasti oleh plaintif sebagai salah seorang yang menyerangnya (lihat perenggan 19–21, 27, 34–36).

(2) Tiada keterangan yang mencukupi untuk membuktikan penyalahgunaan kuasa tidak jujur secara sengaja di pihak defendan kelapan atau dia mempunyai penilaian sebenar bahawa plaintif akan mengalami kerugian atau dengan cuai tidak mempedulikan sama ada plaintif akan mengalami kerugian (lihat perenggan 43).

(3) Jika hubungan rapat antara tindakan menyimpang oleh seorang pekerja dan tujuan atau sifat perkerjaannya dapat dibuktikan oleh fakta keterangan tertentu, pekerja itu boleh didapati bertindak dalam skop perkerjaannya. Dalam kes ini, tindakan defendan yang dikatakan itu adalah berkait rapat dengan tindakan mereka yang mempunyai kuasa untuk menjalankan soal siasat. Mereka menghendaki pengakuan daripada plaintif dan untuk mendapatkan pengakuan tersebut, mereka

telah menyerangnya (lihat perenggan 68 & 70).

(4) Plaintif berhak untuk meneruskan tuntutan untuk ganti rugi tauladan walaupun defendan telah menerima hukuman penjara berikutan sabitan mereka terhadap serangan yang mana merupakan dasar tindakan itu. Keputusan hakim tentang jenis ganti rugi yang sewajarnya diawardkan dalam rayuan-rayuan adalah betul. Hakim telah mengambil kira pertimbangan wajar terhadap kesemua faktor yang hendak diputuskannya (lihat perenggan 89).]

Notes

For cases on assault by servant in course of employment, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5–6.

Cases referred to

A v Bottrill [2003] 1 AC 449, PC (refd)
Archer v Brown [1985] QB 401, QBD (refd)
Asghar v Ahmed (1984) 17 HLR 25, CA (refd)
Bazley v Curry [1999] 2 SCR 534, SC (folld)
Cassell & Co Ltd v Broome [1972] AC 1027, HL (refd)
Feldman (Pty) Ltd v Mall 1945 AD 733, SC (refd)
Grey v Motor Accident Commission (1998) 196 CLR 1, HC (refd)
Jacobi v Griffiths [1999] 2 SCR 570, SC (folld)
K v Minister of Safety and Security 2005 (6) SA 419 (CC) (folld)
Keppel Bus Co Ltd v Sa'ad bin Ahmad [1972] 2 MLJ 121, CA (refd)
Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675, CA (refd)
LBCN Development Sdn Bhd & Anor v Pengarah Tanah dan Galian Selangor & Ors [2014] 3 MLJ 445; [2014] 3 CLJ 970, CA (refd)
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610; [2009] 5 CLJ 1, CA (refd)
Lister v Hesley Hall Ltd [2001] UKHL 22, HL (distd)
Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826, CA (refd)
Mohamud v WM Morrison Supermarkets plc [2014] EWCA Civ 116, CA (folld)
MP v City of Sacramento (2009) 177 Cal App 4th 121, CA (refd)
Norberg v Wynrib [1992] 2 SCR 226; [1992] 15 (SCC), SC (refd)
Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors [2014] MLJU 1178, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar Ors [1996] 3 MLJ 337, HC (refd)
Samin bin Hassan v Government of Malaysia [1976] 2 MLJ 211, FC (refd)

State of NSW v Delly [2007] NSWCA 303, CA (refd)
Thompson v Metropolitan Police Comr [1997] 2 All ER 762, CA (refd)
Three Rivers District Council v Bank of England (No 3) [1996] 3 All ER 558, QBD (refd)
Tweedie v Insurance Corp of British Columbia 2002 BCSC 1937, SC (refd)
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, HC (refd)
Vorvis v Insurance Corp of British Columbia [1989] 1 SCR 1085; [1989] 93 (SCC) 273, SC (refd)

Legislation referred to

Evidence Act 1950 ss 7, 8(2), 9
Government Proceedings Act 1956 ss 5, 6
Penal Code ss 34, 330

Appeal from: Civil Suit No 21NCVC-205–09 of 2011 (High Court, Kuala Lumpur)

Hazman Ahmad (Omar Ismail Hazman & Co) in Civil Appeal No W-01(NCVC)(W)-264–07 of 2013 for the appellants.
Azizan bin Md Arshad (Mariam Hasanah bt Othman and Kasturi a/p Arumugam with him) (Deputy Public Prosecutor, Attorney General's Chambers) in Civil Appeal No W-01(NCVC)(W)-280–08 of 2013 for the appellants.
Melissa Sasidaran (Syahredzan Johan with her) (Ramrais & Partners) in Civil Appeal No W-01(NCVC)(W)-291–08 of 2013 for the appellant.
Adenan Ismail (Adenan & Assoc) in Civil Appeal No W-02(NCVC)(W)-1773–08 of 2013 for the appellants.
Ravi Nekoo (Hakem Arabi & Assoc) in Civil Appeal Nos W-01(NCVC)(W)-264–07 of 2013, W-01(NCVC)(W)-280–08 of 2013, W-01(NCVC)(W)-291–08 of 2013 and W-02(NCVC)(W)-1773–08 of 2013 for the respondents.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] Before us there were four related appeals, namely:

(a) Civil Appeal No W-01(NCVC)-W-264–07 of 2013;

(b) Civil Appeal No W-01(NCVC)-W-280–08 of 2013;

(c) Civil Appeal No W-01(NCVC)-W-291–08 of 2013; and

(d) Civil Appeal No W-02(NCVC)-W-1773–08 of 2013.

[2] These appeals were heard together since they involved the same parties and similar questions of law considered by the court below. The parties also

agreed that we should hear the appeals together.

[3] We will refer to the parties as they were in the High Court. In the High Court there was only one plaintiff. But he was not just a respondent, he was also the appellant in the fourth appeal.

[4] Initially, the suit was filed against the nine named defendants in the court below. However, the suit against the sixth defendant was withdrawn, when the plaintiff filed a 'Notis Pemberhentian' dated 12 October 2012. The trial proceeded with the remaining defendants. Accordingly, any reference to the defendants in this judgment shall exclude reference to the sixth defendant.

[5] The appeals emanated from the decision of the learned judge of the High Court at Kuala Lumpur, who held that the first to seventh defendants had assaulted the plaintiff and the eighth defendant had committed a tort of misfeasance in public office and as such the ninth defendant was variously liable for the acts of the defendants. The first to seventh defendants were then police officers at IPD Brickfields, D7 Unit. The eighth defendant was the OCPD in charge of IPD Brickfields at the time the plaintiff was arrested by the first to seventh defendants. The ninth defendant was the employer of the first to eighth defendants.

[6] The learned judge awarded the plaintiff RM50,000 in general damages, RM100,000 in aggravated and exemplary damages and RM150,000 in punitive damages with interest of 5%pa from the date of the judgment until final settlement. The court also ordered costs in the sum of RM50,000 to be borne jointly and severally by the defendants.

FACTS OF THE CASE

[7] The first to seventh defendants had earlier been charged in the sessions court at Kuala Lumpur with voluntarily causing hurt to the plaintiff to extort a confession, an offence under s 330 of the Penal Code read together with s 34 of the same Code. At the conclusion of the trial, the sessions court convicted the first and second defendants of the offence charged and sentenced them to four years of imprisonment. The third to seventh the defendants were acquitted. On appeal, the orders of conviction and acquittal were affirmed by the High Court.

[8] It was common ground that on 23 December 2008, the plaintiff was arrested at Sri Hartamas, Kuala Lumpur by a police team from IPD Brickfields. He was taken to the Brickfields Police Station. Subsequently, the plaintiff was taken to 'Bilik Detektif, D7 Unit' for the interrogation and/or investigation ('soal siasat').

[9] It was the plaintiff's pleaded case that he was assaulted whilst in detention at *bilik detektif*, D7 Unit by the first to seventh defendants, as a result of which he sustained injury both bodily and psychologically.

[10] The learned judge found that the first to seventh defendants had poured hot water on the plaintiff, blindfolded, kicked, punched and tied his neck to the ceiling fan. The learned judge also found these assaults only stopped when the plaintiff 'confessed'. The plaintiff suffered scalding burns as diagnosed by SP1, when he examined the plaintiff on 30 December 2008. In arriving at the aforesaid decision, the learned judge had referred to the photographs marked as P7A–H (see *rekod rayuan Jld* 2(1) — *Bahagian* C at pp 184–187 and 311–314).

[11] The plaintiff was later taken for treatment whilst still under police custody by the second defendant. He was not taken to a government hospital for treatment. The learned judge's comment was as follows (at pp 7–8 of RTRT):

> He was later taken while still under Police Custody for treatment by inter alia the 2nd Defendant and SP5 to a clinic in Balakong where the Doctor was known not to ask questions instead of a Government doctor at a Clinic Government Hospital.

[12] The learned judge had considered the evidence of Associate Professor Dr Marhani Midin ('SP7') who was at that time and still is a consultant psychiatrist from Pusat Perubatan Universiti Kebangsaan Malaysia ('UKM'). Based on SP7's testimony, the learned judge accepted the fact that the plaintiff was suffering from post-traumatic stress disorder.

[13] The learned judge concluded that there was no reason not to accept nor even doubt the testimony of the plaintiff. The learned judge, therefore, found that liability had been proved against the first to seventh defendants.

[14] Concerning the eighth defendant, the learned judge found that he had committed a tort of misfeasance in public office in allowing the first to seventh defendants who were under his charge to cause pain, injury, loss and suffering to the plaintiff.

[15] The learned judge found the ninth defendant was vicariously liable for the acts of the defendants. The learned judge reasoned that the unlawful acts of the defendants were so closely connected with the acts that they were authorised to do.

[16] Being dissatisfied with the decisions, the second, third, fourth, fifth, seventh, eighth and ninth defendants appealed to this court. The first defendant did not lodge any appeal.

THE APPEAL

[17] Substantially, these appeals were directed to the following issues:

(a) whether the second defendant (Mohd Diah bin Sulaiman); the third defendant (Zulkiply bin Zaid); the fourth defendant (Abdullah bin Musa); the fifth defendant (Zamrin bin Zaid) and seventh defendant (Nizam bin Abdul Wahab) unlawfully assaulted the plaintiff in *bilik detektif*, D7 Unit;

(b) whether the eighth respondent (ASP Wan Abdul Bari bin Wan Abdul Khalid) had committed a tort of misfeasance in public office for being allegedly unable to supervise his men and ensure that they carried out their responsibilities in accordance with the law;

(c) whether the ninth respondent (Government of Malaysia) was vicariously liable for the acts of the first, second, third, fourth, fifth, seventh and eighth defendants?; and

(d) whether exemplary damages can in law be awarded to the plaintiff where the first and second defendants had been convicted and sentenced by a criminal court on a charge in respect of the corresponding acts.

[18] We will discuss the above issues in turn.

Issue (a)

The second defendant

[19] We were satisfied that there was sufficient evidence to support the findings of the learned judge that the second defendant had assaulted the plaintiff. The plaintiff had testified that the second defendant had hit the soles of the plaintiff's feet with a rubber hose and had continuously filled cups of hot water from the water dispenser kept in D7 and splashed the hot water on the plaintiff.

[20] The evidence of the plaintiff was corroborated by SP4. SP4 testified that he saw the first and the second defendants torture the plaintiff by splashing hot water on him, acting aggressively towards him and shouting and yelling at him.

[21] The entries in the station diary on 24 December 2008 clearly showed that it was the second defendant who was doing the 'soal siasat' (see Bundle H, at p 51).

[22] It was the plaintiff's evidence that the second defendant had tried to buy the plaintiff's silence by giving the plaintiff RM500 and promised to get a job for him. The evidence on record revealed that the second defendant had taken the plaintiff to a private clinic in Balakong for treatment and insisted that the doctor there not maintain any records of the plaintiff's treatment.

[23] The aforesaid acts of the second defendant were certainly relevant under sub-s 8(2) and s 9 of the Evidence Act 1950 and the second defendant must explain why he was behaving in that way (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 (FC)). Unfortunately, no explanation was forthcoming from the second defendant. In our judgment, there was a clear nexus between the conduct of the second defendant and the allegations made against him.

[24] Learned counsel for the defendants submitted that the evidence of SP4 suffered from serious contradictions and, was therefore, rendered uncreditworthy. SP4 had given two contradictory statements to Insp Faizal ('SP6'), the Bukit Aman officer who was called to investigate the occurrence of events that transpired in *Bilik Detektif*, D7 Unit, IPD Brickfields on 23–24 December 2008.

[25] We were unable to agree with those submissions. SP4 had explained the circumstances of how the two contradictory statements were made. SP4 testified that he was asked to attend a briefing where the first to seventh defendants and C/Insp Shaharuddin were also present. At this briefing, the second defendant had instructed SP4 to say that the plaintiff had sustained injuries when the police were arresting them. The scalding was due to Maggie Mee soup coming into contact with the plaintiff's body. To our mind, SP4's explanation was not inherently incredible so as to warrant a complete rejection of his evidence.

[26] In the result, the appeal by the second defendant against liability must fail.

The third and fifth defendants

[27] We had scrutinised and evaluated the evidence on record and found no direct evidence connecting the third and fifth defendants to the alleged assault.

[28] As far as the evidence against the third and fifth defendants was

concerned, Lans Kpl Zalifah ('SP5') was an important witness. SP5 testified that the plaintiff was blindfolded with a white cloth and handcuffed while he was in *bilik detektif*, D7 Unit. SP5 further testified that she was shocked when the second defendant told her that the plaintiff was injured. SP5 confirmed that she had informed C/Insp. Shaharuddin that the injuries were sustained by the plaintiff during 'soal siasat'.

[29] Learned counsel for the plaintiff submitted that the 'soal siasat' was going on until 3.25am on 24 December 2008 and the plaintiff was only sent back to the lock up at 3.25am the same day. It was in evidence that the third defendant had questioned the plaintiff. The fifth defendant went back to *bilik detektif*, Unit 7, after the raid and arrest of the plaintiff and he saw the plaintiff was blindfolded. It was the contention of learned counsel that the third and fifth defendants had participated in assaulting the plaintiff.

[30] Learned counsel for the plaintiff further submitted that based on the circumstantial evidence adduced before the court below, it was open for this court to infer that the third and fifth defendants had participated in assaulting the plaintiff.

[31] With respect, we disagree. Having examined the evidence carefully, we concluded that circumstantial evidence proffered by the plaintiff has not proven the case against the third and fifth defendants on the balance of probability.

[32] In the Canadian case of *Tweedie v Insurance Corp of British Columbia* 2002 BCSC 1937, Mr Justice Wilson provided a helpful discussion of the approach that must be taken to the proof of a plaintiff's case where it rests on circumstantial evidence. The learned judge said:

> [61] The principles as I understand are these:
>
> (a) Where a case is not proved by direct evidence, the court will carefully examine and consider the relevant circumstantial evidence.
>
> (b) Circumstantial evidence derives its effect through the process of the trier of fact drawing reasonable inferences. That is a cognitive process whereby, once certain facts are established or proven, then a logical conclusion is considered. It is the process of reasoning from a proven fact or facts to a reasonable, rational and logically legitimate conclusion.
>
> (c) The drawing of an inference is different than mere conjecture or a guess, no matter how shrewd or plausible that guess might be.
>
> (d) An inference, once properly drawn, must give rise to a reasonable conviction in the mind of the trier of fact that the element of which proof is necessary is at least more likely than not, or to some greater degree of certainty.

A (e) The plaintiff can succeed in proving his case on the strength of a reasonable inference which gives rise to a conclusion that the element has been proven on a balance of probabilities. If the inference does not support the conclusion to that standard, then the proof is not made out.

B **[33]** The plaintiff has not discharged the onus of proof required to establish his claim against the third and fifth defendants on the balance of probability. Therefore, their appeals should be allowed.

C The fourth and seventh defendants

[34] The evidence on records revealed that the fourth defendant was in the *bilik detektif*, Unit D7. He also confirmed that the plaintiff was injured whilst in custody at IPD Brickfields. There was no evidence that he had left the *bilik* D *detektif*, D7 Unit, any time prior to another person who was arrested with the plaintiff, one Solomon Raj, being taken out of the room. It was in the evidence that Solomon Raj was taken to 'bilik sebelah' only after the 'hot water incident'. But, before Solomon was taken out, the defendants had already started assaulting the plaintiff. The fourth defendant had kicked and assaulted the E plaintiff.

[35] The seventh defendant was positively identified by the plaintiff as one of the persons who had assaulted him in *bilik detektif*, D7 Unit.

F **[36]** In our view, based on the evidence and circumstances of the case, the fourth and seventh defendants had the opportunity to assault the plaintiff. In *Sarkar Law of Evidence*, (16th Ed), it was explained in relation to s 7 of the Evidence Act 1950 at p 218 as follows:

G The reason for admission of facts of this nature is that, if you want to decide whether a thing occurred or not, almost the first natural step is to see whether there were facts at hand calculated to produce or afford opportunity for its occurrence, or facts which its occurrence was calculated to produce.

H **[37]** We were mindful that mere presence at the *bilik detektif*, D7 Unit, was not sufficient to impute liability on the part of the fourth and seventh defendants. Something more was needed. The uncontroverted testimony of the plaintiff confirmed that the seventh defendant was one of the persons who had assaulted him.

I **[38]** Therefore, the appeals by the fourth and seventh defendants must be dismissed.

Issue (b)

[39] Learned counsel for the plaintiff submitted that the eighth defendant had committed the tort of misfeasance by public officer because of his tacit inability to supervise his men and ensure that they carried their responsibilities in accordance with the law. As the senior officer in IPD Brickfields, he took responsibility for all acts and/or omissions of the men and women under his charge. Learned counsel criticised the eighth defendant's lackadaisical and cavalier attitude about the incident. During cross-examination, the eighth defendant stated that there was no need to review the SOP on investigations and to commence any internal investigation about the incident, as Bukit Aman had already commenced investigations.

[40] With respect, the submission is devoid of merits. It is pertinent to note that the eighth defendant was overseas when the incident occurred. He only came back on 31 December 2008. Therefore, he did not know about the incident on 23 November 2008. In our judgment, the eighth defendant is not competent to review the SOP on investigations because it would involve policy considerations. As a matter of practice, such a review would be conducted by the Criminal Investigation Department, Bukit Aman. There is no necessity for the eighth defendant to commence any internal investigation as Bukit Aman had already commenced investigation. It stands to reason that the internal investigation must be conducted by independent and unbiased officers from Bukit Aman.

[41] The tort of misfeasance in public office was explained, inter alia, in the *Three Rivers District Council v Bank of England (No 3)* [1996] 3 All ER 558. In order to make out the tort of misfeasance in public officer, it must be shown that the defendant is a public officer, and that the claim relates to the defendant's exercise of power as a public officer. The crux of the tort however, is the mental state of the defendant. It essentially boils down to two alternative elements. First, the most stringent element of this tort is known as targeted malice and requires proof that a public officer has acted with the intention of injuring a claimant. The evidentiary requirement of the second element is less strict and in essence that element is made out when a public officer acts in the knowledge that he thereby exceeds his powers and that this act would probably injure the claimant.

[42] For the purpose of the second limb of the tort, the current position is as follows. First, there must be knowledge as to illegality. The claimant must show either that the officer had actual knowledge that the impugned act was unlawful or that the public officer acted with a state of mind of reckless indifference to the illegality. Second, conditions as to the awareness of consequences must also be fulfilled. The claimant must show not only that the public officer acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the claimant (see *The*

Law of Tort, (2nd Ed), LexisNexis Butterworths at p 926 para 17.46; *LBCN Development Sdn Bhd & Anor v Pengarah Tanah dan Galian Selangor & Ors* [2014] 3 MLJ 445; [2014] 3 CLJ 970 (CA)).

[43] From the facts of these instant appeals, we found that there was no sufficient evidence to establish the deliberate dishonest abuse of power on the part of the eighth defendant or that he had actual appreciation that the plaintiff would suffer loss or was recklessly indifferent as to whether the plaintiff would suffer loss.

[44] Therefore, the appeal by the eighth defendant must succeed.

Issue (c)

[45] The learned senior federal counsel appearing for the Government of Malaysia (the ninth defendant) submitted that the unlawful acts committed by the defendants *pro hac vice* placed them far outside the category of employees acting within the scope and course of their employment as public officers entrusted with the enforcement of law and order. They were, as it is commonly referred to, employees 'going on a frolic of their own'. There was not even the slightest shred of evidence indicating that they were authorised to assault the plaintiff. C/Inspector Shaharuddin directed them to conduct investigation. Therefore, the defendants were not acting or purporting in good faith acting in pursuance of a duty imposed by law when they committed the impugned acts. They were personally liable (see ss 5 and 6 of the Government Proceedings Act 1956).

[46] In essence, the learned senior federal counsel's argument was that the evidence in these instant appeals admitted no doubt that the defendants were engaged in unlawful acts, inconsistent with the scope of their employment. It follows, therefore, that the ninth defendant could not be held vicariously liable for unlawful acts of the defendants. To do so would amount to unduly imposing absolute liability on the ninth defendant in circumstances where the delict of its servants clearly fall outside the course and scope of their employment or are inconsistent with their duties.

[47] In support of his submissions, reliance was placed on the case of *Samin bin Hassan v Government of Malaysia* [1976] 2 MLJ 211. The brief facts of the case were that the driver had taken out the vehicle for his own purpose which was clearly to go home for his lunch and that in doing so he had no permission and was driving on his own. The Federal Court held that the Government of Malaysia was not liable for the negligence of the servant which he was not employed to do (see also *MP v City of Sacramento* (2009) 177 Cal App 4th 121; *Feldman (Pty) Ltd v Mall* 1945 AD 733).

[48] In reply, learned counsel for the plaintiff submitted that the learned judge was correct when he found the ninth defendant was vicariously liable for the impugned acts of the first, second, third, fourth, fifth, seventh and eighth defendants. His Lordship had applied the test laid down by this court in *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826 where the decision of *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121 was followed. The Court of Appeal had this to say at p 835:

> The principle of the employer being responsible for the act of its employee, in the course of his employment, was applied in its full force in *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121. In that case, the Court of Appeal of Singapore found that there was sufficient evidence for the trial judge to conclude that the conductor in hitting the respondent in a very high handed manner, was acting in the course of employment.

[49] Now, the question whether the ninth defendant should be vicariously liable for the misdeeds of the first to eighth defendants is an intriguing one. Indeed, questions of this kind are often extremely difficult to resolve and the law reports are replete with fascinating examples of the infinite variety and complexity of the kinds of locus that have engaged the courts for many years. The distinctions are subtle and the dividing lines are often faint and debatable.

Principle of vicarious liability under common law

[50] We will begin our discussion on this issue by setting out the principles of various liability under common law. Vicarious liability means the liability of one person for the delict of another. This form of liability applies to certain relationships, one of which is the employer and employee relationship. Thus, an employer is liable for the damage caused by the delict of an employee, committed while acting within the course and scope of her duties as an employee. The employer is liable despite the fact that it is the employee who has committed the wrong and the employer is not at fault. Vicarious liability is, therefore, at odds with a basic norm of our society, namely that liability for harm should rest on fault, either in the form of negligence or intention.

[51] The rationale for vicarious liability is to be found in a number of underlying principles. One of these is the creation of a risk or danger of damage to others. As it was put in the case of *Feldman (Pty) Ltd v Mall* 1945 AD 733:

> [A] master who does his work by the hand of a servant creates (for his own ends) a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy ... he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work.

[52] Another principle underlying vicarious liability is the desirability of affording the claimants effective remedies for harm they have suffered. A

A further principle is the need to encourage employers to take active steps to prevent their employees from causing harm to members of the broader community.

B **[53]** The normative content of the above principles means that vicarious liability is fundamentally a policy-laden concept. Yet despite this, our courts have traditionally asserted (with few exceptions) that the common law rules of vicarious liability are not to be confused with the reasons for them, and that their application remains a matter of fact. Thus, cases of vicarious liability under common law have been dealt with on the basis that three factual C conditions must be met:

(a) the existence of an employer-employee relationship;

(b) a delict committed by the employee; and

D (c) the employee acting within the course and scope of her employment.

[54] Of the three conditions, the question of whether the employee was acting within the course and scope of his or her employment when he or she committed the delict has proved the most difficult to answer in practice. At one E extreme is the delict committed by the employee while going about his or her employment in the ordinary course. At the other extreme is the delict committed by the employee going about his or her own business, unconnected to that of the employer, often referred to as the employee 'going on a frolic of his own'. Between these two extremes lies what the courts have described as 'an F uncertain and wavering line'.

[55] In navigating this line, the courts, rather than drawing on the normative principles underpinning vicarious liability, have engaged in the somewhat artificial exercise of attempting to plot the employee's delict on a space/time G continuum in relation to her employment. Thus, in *Feldman (Pty) Ltd v Mall*, Tindell JA held that the test to be applied is 'whether the circumstances of the particular case show that the servant's digression is so great in respect of time and space that it cannot reasonably be said that he is still exercising the functions to which he was appointed; if this is the case then the master is not H liable'.

[56] In deciding whether an employee's tort has been committed in his or her employment, usually the so-called '*Salmond* test' is applied. Salmond maintained that a wrongful act done by a servant is deemed to be in the course I of employment if it is either: (a) a wrongful act authorised by the master, or (b) a wrongful act and unauthorised mode of doing some act authorised by the master. Further, a master is liable even for acts which he or she has not authorised, provided they are so connected with acts which he or she has authorised, that they may be rightly be regarded as modes — although

improper modes — of doing them. So, if the unauthorised and wrongful act of the servant is not so connected with the authorised act so to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting the course of his or her employment, but has gone outside it.

Development of the close connection tests in common law countries

Canada

[57] The Canadian case of *Bazley v Curry* [1999] 2 SCR 534concerned a warden of a school for troubled boys who sexually abused some of them. The question which the Supreme Court of Canada had to answer was whether the employer could be held liable for these acts, which were the antithesis of what a person in the position of the warden was employed to do.

[58] McLachlin J for the majority, stated that courts should openly confront the question of whether the liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct.' The court further stated that the fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. According to the court, vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of risk and the wrong that accrues therefrom. The court reasoned that where this is the case, holding the employer liable, will serve to fulfill policy considerations, the first of which would be providing an adequate and just remedy to the victim. Equally important was the notion that by holding the employer liable, the second policy consideration of deterrence would be met, namely encouraging the employer to take preventative measures to guard against wrongdoing by employees.

[59] The following factors would, according to the court, indicate that there is a significant risk that the wrongful act would take place:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims;

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the enterprise;

(d) the extent of power conferred on the employee in relation to the victim; and

(e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[60] The judgment in *Jacobi v Griffiths* [1999] 2 SCR 570 in which the test formulated by McLachlin J in the *Bazley* case was applied, did not result in the employer being held liable. In that case, children at a youth club were under the supervision of an employee in charge of recreational activities. The employee invited two of the children to his house, where acts of sexual abuse took place. The Canadian Supreme Court held that the employer was not vicariously liable as the employee was not placed in a special position of trust and power with respect to the children. His position did not significantly increase the risk that such abuse would take place. The children did not live at the club, could go home at any time and did not have to go to the employee's house. The employee's duties did not include 'parenting activities' that usually include intimate care as was the case in the *Bazley* decision. The Supreme Court of Canada held in the *Jacobi* case that the employer was not vicariously liable as the connection between the acts of the employee and the risk created by the employer's business was not sufficiently close. The mere opportunity provided by his employment was not sufficient to establish a close connection.

England

[61] In *Lister v Hesley Hall Ltd* [2001] UKHL 22, a warden of a school for boys with emotional and behavioural problems sexually abused some of the boys. The House of Lords quoted the decision in *Bazley* with approval and applied the close connection test. However, the court did not base its decision on a close connection between the acts of the employee and the risk created by the employer's business. Lord Steyn, for the majority, simply required a close connection between the acts of the employee and the employment (or authorised acts of the employee). This test seems to focus on factual closeness, as Lord Steyn remarked:

> [T]here is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers, while the warden was also caring for the children.

Lord Clyde 48 stated that:

> ... the care and safekeeping of the boys had been entrusted (to him and) his position as warden and the close contact with the boys which that work involved created a sufficient connection between the acts of abuse which he committed and the work which he had been employed to do.

[62] The 'sufficient connection' test established by the House of Lords in the case of *Lister v Hesley Hall Ltd* has been elaborated upon in a number of subsequent decisions; most recently in *Mohamud v WM Morrison Supermarkets*

plc [2014] EWCA Civ 116, in which the Court of Appeal was asked to consider whether a supermarket was vicariously liable for an assault by a petrol station assistant on a customer. In March 2008, Mr Mohamud visited the petrol station of a Morrison's Supermarket. He asked Mr Khan, a Morrison's employee, if it was possible to print some documents stored on a USB stick which he was carrying. Mr Khan responded in an abusive fashion, including using racist language. Mr Mohamud left the petrol station and walked to his vehicle. Mr Khan followed Mr Mohamud, told him to get out of his car and, when he did, punched Mr Mohamud on the head, leapt on him and subjected him to a serious attack involving punches and kicks while Mr Mohamud was curled up on the petrol station forecourt. The trial judge found that Mr Mohamud was in no way at fault and had not behaved offensively or aggressively at any stage — the attack was 'brutal and unprovoked'.

[63] Mr Mohamud sued Morrison Supermarkets, claiming it was vicariously liable for Mr Khan's actions. The trial judge held that Morrison Supermarkets were not vicariously liable, and the Court of Appeal agreed. The court held that the application of the test for vicarious liability in *Lister* was fact sensitive, and that, in seeking to determine whether the test was satisfied, a court had to focus closely on the facts of the case and pay careful attention to the closeness of the connection between the employee's wrongdoing and the duties they were employed to do. The required connection was not present on the facts of this case. The assault had taken place at a time when Mr Khan's supervisor had told him not to follow Mr Mohamud out of the petrol station. Mr Khan had made a positive decision to leave the petrol station and follow Mr Mohamud, and he had for 'no good or apparent reason' carried out the attack 'purely for reasons of his own'. Further, the duties imposed on Mr Khan in terms of his interaction with customers were relatively limited and involved no element of authority over them or responsibility for keeping order.

[64] The case could be distinguished from cases involving vicarious liability where the employee was given duties involving the clear possibility of confrontation and the use of force, or was placed in the situation where an outbreak of violence was likely, such as a night club doorman. Mr Khan's duties included no element of keeping order over customers.

South Africa

[65] In the case of *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), Judge Mogoeng stated that despite the fact that an employee's deviated conduct is 'great in respect of space and time', it would not necessarily mean that the employer would not be held vicariously liable. The employer should be held liable if a connection exists between the unlawful conduct complained of and the business of the employer. The mentioned link must be 'real' and a

'sufficiently close one'. This case concerned the brutal rape of a 14 year-old girl by an off duty, but on standby, police officer while giving the victim a lift. The court stated that an important consideration with regard to the objective consideration of the two-stage test is whether a close connection exists between the wrongful conduct and the wrongdoer's employment. An 'explicit recognition of the normative content' is required at this stage of the test.

[66] Judge Mogoeng reasoned that police officers have a constitutional duty to prevent crime and protect members of the public. Everyone, according to the Constitution, has a right to freedom of the person. Vulnerable groups in general and women and children in particular should be especially protected. The state must respect, protect, promote and fulfil the right in the Bill of Rights. Constitutional duties of police officers suggest that there is a normative basis for holding the state vicariously liable, even in the event of a of duty police officer that is on standby. The court also suggested that the fact that the victim trusted the police officer to fulfil his constitutional obligation created the connection between the wrongful act and the purpose of his employment.

Summary of the principles of vicarious liability

[67] The above discussion may be summarised by stating that the common law requirement, which states that 'an employee should act within the scope of his employment' to find his employer vicariously liable, has initially been interpreted by the courts in terms of the *Salmond* rule. An employee, according to the rule, was not acting within the scope of employments, if these wrongful actions or conduct was against the employer's instruction or interest. The cases discussed above developed the standard test to include deviated actions of employees. These cases, especially the case of *K v Minister of Safety and Security*, formally introduced the close connection test into the common law principle of vicarious liability.

[68] We respectfully agree with the decisions of the above cases. In our opinion, if a close connection between the deviated actions of an employee and the purpose or nature of his employment is established by certain factual evidence, an employee may be found to be acting within the scope of his employment.

[69] We now turn to the factual matrix of these instant appeals. We were satisfied that unlawful acts of the defendants were very closely connected with the acts that they were authorised to do so. In other words, the acts were not so divorced from their works. We said so based on the following facts:

(a) the first, second, third, fifth defendants and SP4 and SP5 all confirmed that the plaintiff was arrested at the car park in Sri Hartamas;

(b) it was also in the second defendant's evidence that the arrest was done when he saw a motorcycle Honda EX5 bearing registration No WPV 5106 parked in front of the pub 'My Place', which he claimed to have been used for extortion and robbery. He then informed C/Insp Shaharuddin. It was the second defendant's evidence that C/Insp Shaharuddin then arrested the plaintiff and one Solomon Raj;

(c) subsequently, when the plaintiff was brought to IPD Brickfields, according to the second defendant, C/Insp Shaharuddin had instructed SP4 and Konstable Safri to take the plaintiff to 'Bilik D7 untuk disoalsiasat' (see p 4 Q7A 20);

(d) the plaintiff was taken to *bilik detektif*, D7 Unit, for the 'soal siasat'. In this *bilik* D7 Unit, 'soal siasat' did take place;

(e) the purpose of this 'soal siasat' was connected to the 13 robbery cases in the Sri Hartamas; and

(f) in the process of this 'soal siasat', the plaintiff was abused, tortured and beaten. The third and fifth defendants further admitted that the plaintiff was blindfolded and handcuffed.

[70] We agreed with the submissions of learned counsel for the plaintiff that the impugned acts of the defendants were closely connected with the acts that they were authorised to do ie 'soal siasat'. They had wanted an admission out of the plaintiff and in order to extricate this admission from the plaintiff, they were beating and splashing hot water on the plaintiff.

[71] It follows, therefore, that the appeal by the ninth defendant on the issues of vicarious liability must fail.

Issue (d)

[72] The learned senior federal counsel submitted that the learned judge was in error when awarding exemplary damages to the plaintiff where the first and second defendants had been convicted and sentenced by a criminal court on a charge in respect of the corresponding acts.

[73] The learned senior federal counsel further submitted that the sole purpose of exemplary damages was to punish and deter the tortfeasor. If there has been a prior conviction and a penalty imposed for the same acts, then punishment has already been exacted. Any award of exemplary damages would thus amount to double punishment, as the civil court would be imposing a second penalty for the same conduct.

[74] The best of reference for a consideration of an award of exemplary

damages is, of course, the case of *Rookes v Barnard* [1964] AC 1129. It would be recalled that in that case Lord Devlin specified the following three categories of cases where they could be awarded:

(a) where there is 'oppressive, arbitrary or unconstitutional action by the servants of the government';

(b) where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'; and

(c) where they are expressly authorised by statute.

[75] An important point to note is that the three categories of conduct above are to be read disjunctively. The House of Lords in *Cassell & Co Ltd v Broome* [1972] AC 1027, said that 'servant of the government should be widely construed' to include anyone exercising governmental power.

[76] However, the availability of exemplary damages has been curtailed in recent times in response to several concerns as to the double punishment of tortfeasors, in both civil and criminal law; where the same set of facts lead to civil claim for exemplary damages and a criminal charge, the courts have tended to restrict the availability of exemplary damages in favour of the criminal charge.

[77] In *Archer v Brown* [1985] QB 401, the punishment already exacted by the criminal courts was treated as sufficient to bar an exemplary award. In this matter, Pain J decided not to award exemplary damages against a defendant who had already been convicted and imprisoned in respect of a corresponding criminal offence. The judge had this to say:

> What seems to put the claim out of court is the fact that exemplary damages are meant to punish and the defendant has been punished. Even If he wins his appeal he will have spent a considerable time in gaol. It is not surprising that there is no authority as to whether this provides a defence, since there is no direct authority as to whether exemplary damages can be given in deceit. Its rest my decision on the basic principle that a man should not be punished twice for the same offence. Since he has undoubtedly been punished, I should not enrich the plaintiff by punishing the defendant again.

[78] In *Grey v Motor Accident Commission* (1998) 196 CLR 1, the brief facts of the case are these. In 1988, the plaintiff Grey experienced a personal injury when the tortfeasors purposely drove his car into him. In 1991, the tortfeasor was convicted of intentionally causing grievous bodily harm to the victim/plaintiff and was sentenced to seven years imprisonment. In 1993, the plaintiff brought an action in negligence against the tortfeasor for personal injury. Exemplary damages formed part of the claim. The insurer was

substituted as defendant. The trial judge made an award in favour of the plaintiff but refused to award exemplary damages on the basis that the tortfeasor had been punished in criminal court, thus obviating the purpose of the award.

[79] The holding in *Archer* and *Grey* that places the limitation of the awarding of exemplary damages where the same conduct gives rise to a criminal charge, has been critiqued from several perspectives. They claim that:

(a) the functions of criminal law and those of civil law overlap and exemplary damages confirm that tort has a very important role to play in determining acts like trespass to the person; defamation etc;

(b) exemplary damages are needed to punish certain types of conduct either not punished at all or inadequately punished by criminal law;

(c) they prevent unjust enrichment by the defendant;

(d) they pacify claimants; and

(e) they are needed to complement compensatory damages as at times compensation is inadequate.

(See Benjamin Andoh, *Exemplary Damages and the Police: Some Reflections,* Mountbatten Journal of Legal Studies; December 2001, 5 (182) pp 90–101).

[80] The Australian case of *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 ('*Uren*') accepted Lord Devlin's clarification that damages had different objects, punishment being one, but rejected His Lordship's ruling that torts not remedied by compensatory damages would be punished as a crime. Taylor J stated:

> I agree that there was, perhaps, some room for a more precise definition of the circumstances in which exemplary damages might be awarded. But with great respect, I do not feel as Lord Devlin did, that such a far-reaching reform as he proposed, and in which the other Lords of Appeal engaged in the case agreed, was justified by asserting that punishment was a matter for the criminal law. No doubt the criminal law prescribes penalties for wrongs which are also crimes but it prescribes no penalty for wrongs which are not at one and the same time crimes, and in both types of cases the courts of this country, and I venture to suggest the courts of England, had admitted the principle of exemplary damages as, in effect, a penalty for a wrong committed in such circumstances or in such manner as to warrant the court's signal disapproval of the defendant's conduct.

[81] In *Asghar v Ahmed* (1984) 17 HLR 25, the Court of Appeal in England upheld an award of exemplary damages in a case where the claimant had been unlawfully and forcefully evicted from his home by his landlord. Even though the landlord was in prison for what he had done, there was 'a great deal more to

the outrageous conduct which followed the eviction which justified the judge's finding'.

[82] Like Australia, Canada also has declined to limit the scope of exemplary damages to the categories set-out by Lord Devlin in *Rookes v Bernard*. In *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085; [1989] 93 (SCC) 273, the Supreme Court of Canada stated:

> ... punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterising a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.

[83] In *Norberg v Wynrib* [1992] 2 SCR 226; [1992] 15 (SCC), the court had this to say:

> ... punitive damages are often awarded 'where the tortfeasor has offended the ordinary standards of morality or decent conduct in the community, or is guilty of moral turpitude. ... They are also awarded where the defendant's conduct amounts to arrogance and callousness'.

[84] We were of considered opinion that the plaintiff was entitled to pursue a claim for exemplary damages even though the defendants have received a sentence of imprisonment following their convictions for the assaults on which the actions based.

[85] In our view, a criminal penalty is one of the factors along with the awards for general damages and aggravated damages that the trial judge must consider in deciding whether exemplary damages should be awarded. The trial judge must consider all of these factors and determine if an award of exemplary damages, in all circumstances, would result in the defendant being punished twice. If so, an award for exemplary damages should not be made. However, this determinative factor is one of fact, not law.

How to calculate awards of exemplary damages

[86] Among the matters that the court might properly consider in deciding on the quantum of an award of exemplary damages are discussed in *McGregor on Damages*, (16th Ed), 1997, at p 306 *et seq*. They include the followings: (a) such awards are to be moderate; (b) the conduct of the parties may properly be taken into account; (c) the quantum of a compensatory award may influence the quantum of an exemplary award; (d) the relevance of any criminal penalty (on the basis that 'punishing twice for the same misconduct offends against the

basic principles of justice ...' p 310, para 467).

[87] In the case of *State of NSW v Delly* [2007] NSWCA 303, Tobias JA set-out the general principles as to exemplary damages (at [85]–[88]). The touchstones are:

(a) the considerations are quite different from compensatory damages and there need be no necessary proportionality between the assessments;

(b) it is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again;

(c) the social purpose is to teach a wrong-doer that 'tort does not pay';

(d) it is to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace;

(e) it marks the court's condemnation of the defendant's behaviour; and

(f) it is an exceptional remedy which was rarely awarded and then only where there is high-handed, insolent, vindictive or malicious conduct.

(See also *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 and *Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors* [2014] MLJU 1178.

[88] In these instant appeals, the learned judge had found the conducts of the first to seventh defendants oppressive, outrageous and appalling and it was an appropriate case for the imposition of aggravated and exemplary damages. In assessing the damages, the learned judge was guided by the decisions of the following cases:

(a) *Thompson v Metropolitan Police Comr* [1997] 2 All ER 762;

(b) *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337;

(c) *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610; [2009] 5 CLJ 1;

(d) *Cassell & Co Ltd v Broome* ; and

(e) *A v Bottrill* [2003] 1 AC 449.

[89] We were of the opinion that the learned judge's decision about the types of damages which could appropriately be awarded in these appeals case was right. The learned judge took into account the proper considerations of all the

factors which he had to decide. Accordingly, there was no ground on which we should interfere with the exercise of his discretion in determining the appropriate damages.

[90] We were reminded of the principle that in order to justify reversing the trial judge's decision on the question of the amount of damages, it will generally be necessary that the court should be convinced either the judge acted upon wrong principle of law, or that the amount awarded was so extremely high or so very small to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. In other words, it must be plain that no reasonable judge properly applying the relevant principles could have awarded so large a sum. The defendant failed to persuade us that this was the case.

CONCLUSION

[91] All in all, we allowed the appeal in part and made the following orders:

(a) the appeals by the second, fourth, seventh and ninth defendants were dismissed;

(b) the appeals by the third, fifth and eighth defendants were allowed; and

(c) the general, aggravated, exemplary and punitive damages awarded by the learned judge were affirmed.

[92] Each party to bear own costs.

Appeal allowed in part.

Reported by Afiq Mohamad Noor